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U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BRENDON COSTELLO,

Plaintiff,

v.

CITY OF LONG BEACH,

Defendant.

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15-CV-2506 (JFB)(AKT)

December 15, 2015

Central Islip, NY

TRANSCRIPT OF CIVIL CAUSE FOR DECISION
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: RICK OSTROVE, ESQ.
BRANDON OKANO, ESQ.

For the Defendant: RICHARD FINKEL, ESQ.

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THE CLERK: Calling 15-CV-2506, Costello v. City of Long Beach, et al.

Counsel, please state your appearance for the record.

MR. OSTROVE: For the plaintiff, Rick Ostrove of Leeds Brown Law, along with Brandon Okano.

MR. FINKEL: For the City of Long Beach and the individual defendant Jack Schnirman, Richard Finkel and Howard Miller of Bond Schoeneck & King. Good afternoon, your Honor.

THE COURT: Good afternoon. As you know, I scheduled the conference because I wanted to place the Court's oral ruling on the record with respect to the pending motion to dismiss. It should take about ten minutes to do that. If you want to order a copy of the transcript, you can do so through the clerk's office. It's placed on the recording system here in the courtroom.

The Court has carefully considered the defendant's motions to dismiss. As a threshold matter, the motion to dismiss the individual defendant Jack Schnirman was not opposed, so I grant that application to respect to Mr. Schnirman.

The City of Long Beach has moved to dismiss the claims against it, arguing that the state court's determination in the Article 78 proceeding has claim in issue and preclusive effect and that the plaintiff fails to assert well-pled facts to support his claims that his termination was politically motivated. For reasons set forth in a minute, I'm denying the City's motion in its entirety.

With respect to the motion to dismiss standard, I won't belabor the record by quoting it in any great details. Both parties obviously agree that the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in plaintiff's favor. Cleveland v. Caplaw Enterprises (ph), 448 F.3d 518 at 521 (Second Circuit 2006). And under the Iqbal/Twombly standard, it's well-settled that in order to survive a motion to dismiss under Rule 12(b)(6), a complaint must allege a plausible set of facts sufficient to raise a right to relief above the speculative level, Operating Local 649 Trust Fund v. Smith Barney Fund Management, LLC, 595 F.3d 86 at page 91 (Second Circuit 2010), quoting Bell Atlantic Corporation v. Twombly, 550 U.S. 544 at 555 (2007).

As the Supreme Court made clear in Twombly, the standard does not require heightened fact pleading of specifics but only enough facts to state a claim to relief that is plausible on its fact. That's at page 570 of the Twombly decision. Applying that standard here, I'm denying the motion.

First, I want to address the defense argument that res judicata applies to certain of the plaintiff's claims. The parties agree that the plaintiff's claims for reinstatement, back pay, injunctive relief and attorney's fees associates with the Article 78 proceeding are precluded by res judicata and should be dismissed. The defendant concedes that emotional damages are not precluded by res judicata. Therefore, I understand the remaining dispute to be whether front pay and attorney's fees associated with this action are precluded by res judicata.

Under the doctrine of res judicata, otherwise known as plain preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. I'm quoting Flattery v. Lang, 199 F.3d 607 at 612 (Second Circuit 1999), quoting other Supreme Court cases. The doctrine only applies if, one, the previous action involved an adjudication on the merits; two, the previous action involved the plaintiffs or those in privity with them; and three, the claims asserted in the subsequent action were or could have been raised in the prior action. Monahan v. New York City Department of Corrections, 214 F.3d 275 at 285 (Second Circuit 2000).

As the Second Circuit has made clear, and I'm quoting now, "In determining whether a second suit is barred by this doctrine, the fact that the first and second suits involved the same parties, similar legal issues, similar facts or essentially the same type of wrongful conduct is not dispositive." Maharaj v. Bank of America Corporation, 128 F.3d 94 at page 97 (Second Circuit 1997). As that court made clear, again that same page, "Rather, the first judgment would preclude a second suit only when it involves the same transaction or connected series of transactions as the earlier suit."

With respect to damages and issues of res judicata and damages, again, the Second Circuit has spoken to this issue and has said the following, quoting, "A New York plaintiff is not barred from seeking damages in federal court on civil rights claims by reason of a prior judgment on the same underlying facts in an Article 78 proceeding requesting injunctive or affirmative relief. The reason is that damages are not available in these circumstances in an Article 78 proceeding. Therefore, that action cannot give the damages relief demanded in a civil rights suit such as this one." Davis v. Halpern, 813 F.2d 37 at page 39 (Second Circuit 1987), quoting other cases.

Obviously, as I said, there's agreement that obviously emotional damages would not be precluded under that standard because of the unavailability in an Article 78 proceeding. I similarly conclude that the defendant has cited no case to me that suggests that front pay is an available remedy in connection with an Article 78 proceeding in this type of situation or this type of issue.

In the absence of any such case law that makes that clear to me, I do not believe res judicata would bar plaintiff's claims for front pay and certainly would not bar attorney's fees associated with this action. Obviously, he could not recover attorney's fees for this action in an Article 78 proceeding. They were not and could not have been raised and decided in that proceeding. For those reasons, the motion under res judicata as to those categories of damages is denied.

Moving to collateral estoppel, collateral estoppel issue preclusion means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit. I'm quoting Leather v. Ten Eyck, 180 F.3d 420 at page 424 (Second Circuit 1899), quoting other cases. Under New York law, collateral estoppel bars relitigation of an issue when, one, the identical issue necessarily was decided in the prior action and is decisive of the present action; and two, the party to be precluded from relitigating the issue had a full and fairy opportunity to litigate this issue in the prior action, quoting from In Re: Hyman, 502 F.3d 61 at page 65 (Second Circuit 2007).

With respect to Article 78 proceedings, again, it's clear that collateral estoppel may bar consideration in Section 1983 cases of an issue that was previously decided in Article 78 proceedings, provided that the plaintiff raised the issue and the issue was actually and necessarily decided by the court. I'm quoting Leo v. New York City Department of Education, 2014 W.L. 6460704 (E.D.N.Y. 2014), quoting Second Circuit law.

Applying that standard here, I find that plaintiff's claims are not precluded by collateral estoppel because whether Mr. Costello was terminated as political retaliation in violation of his constitutional rights was not an issue that was actually and necessarily decided in the Article 78 proceeding. The defendant focuses on the fact that the plaintiff argued his Article 78 petition and that he was terminated in bad faith. In particular, defendant points to plaintiff's allegations that the "City abolished his position in bad faith as a subterfuge pretext to remove him from his position, though grounds for his removal were nonexistent."

The defendant also points to the state court's finding that "The allegations of the petition are insufficient to either overcome respondent city's bona fide reasons for abolishing/failing to fund petitioner's position or to raise a factual question on the issue of bad faith which would require a trial." This is Exhibit 1, page 10.

I conclude after reviewing the record and the Article 78 decision -- I agree with Mr. Ostrove's position as articulated in the briefs and at oral argument that these references to bad faith and the propriety of Costello's termination are limited to the term "bad faith" in the specific context of the civil service law, where that term has a particular definition. They do not demonstrate that the Article 78 court actually and necessarily decided the issue of political retaliation. In fact, a review of the record suggests the opposite. Neither plaintiff's Article 78 petition nor the court's decision mentioned political retaliation. And in defining what petitioner is required to show in order to establish bad faith, the court said only that he must show "that his position was not eliminated for bona fide reasons, i.e. savings were not accomplished or a new replacement employee was hired and performed substantially the same duties as the discharged employee." That's at page 6 of Exhibit I with respect to the decision. I believe that that is basically a limiting definition of what bad faith means in this context and certainly does not analyze whether or not there's any political retaliation.

Furthermore, in concluded that Costello did not make this showing, the court said that Costello failed "to satisfy his burden of establishing bad faith on the part of respondent city by eliminating bona fide reasons for the elimination of his position by showing that no savings were accomplished or by establishing that someone was hired to replace him. That's at page 9 of the decision.

In contrast to some of the cases the defendant cites, there is no development of facts related to or analysis of Costello's claims of retaliation in the decision. Both the petition and the

Court's decision focus on the economic aspects of Costello's position and termination. Moreover, a finding that the determination was rational does not preclude the possibility the political retaliation was also a motivating factor. They are not mutually exclusive determinations.

It is possible that the defendant's decision to terminate the plaintiff was politically motivated even though the Article 78 court found another articulated basis to be sufficiently stated in terms of the bona fide reason. A plaintiff can prove a First Amendment retaliation claim even if the measures taken were otherwise justified. See for example Vargas v. City of New York, 377 F.2d 2000 (Second Circuit 2004), as well as Beechwood Restorative Care Center v. Leeds, 436 F.3d 147 (Second Circuit 2006). So the motion to dismiss on that ground is denied.

Finally, moving to defendant's argument that the complaint fails to plead facts sufficient to show that Costello's termination violated his rights to freedom of political association and right to freedom of an intimate association, I deny the motion on that ground as well. To prove a First Amendment retaliation claim, the plaintiff must demonstrate three elements: One, that he engaged in constitutionally protected speech because he spoke as a citizen on a matter of public concern; two, he suffered an adverse employment action; and three, the speech was a motivating factor in the adverse employment decision. This is set forth in one of my prior decisions, Monet v. Nassau County (ph), 2015 W.L. 1469982 (E.D.N.Y. 2015), citing Second Circuit law.

In connection with this motion, defendant focuses on the third element, arguing that plaintiff has failed to adequately plead facts that would show defendant knew of his political affiliation. I find that the complaint sets forth facts sufficient to plead a First Amendment retaliation and intimate association claim, again highlighting the fact that the Court has to accepts the facts as true, draw all reasonable inferences in the plaintiff's favor and then determine whether or not a plausible claim exists, including whether or not it's plausible that the defendants knew of his political affiliation.

Plaintiff alleges in the complaint in paragraph 14 that his political affiliation was well-known, that he attended several public functions hosted by the Republican Party, made several donations to the Republican Party, made comments regarding his political beliefs on social media and discussed his affiliation and views with others. Plaintiff in other paragraphs, 9 and 10, 14 through 18, 26, 34, 35 and 42 through 57, alleges essentially that an inference can be drawn that the defendant was aware of his political associations from the timing of the events surrounding his termination. Based upon those allegations and, again, utilizing any reasonable inferences that can be drawn in plaintiff's favor, there are certainly sufficient facts to allege a plausible claim of retaliation, including knowledge of his political affiliation.

I could reach a similar conclusion with respect to the intimate association claim. First of all, I don't believe it is redundant of the political affiliation. Whether a plaintiff was terminated for his own political affiliation or the affiliation of his mother are two distinct claims. Plaintiff is not required -- one doesn't necessarily require proof of the other. Plaintiff alleges the defendant knew his mother was a politically active Republican and she herself was terminated around the time that the Democrats gained control of the city council. That's in paragraphs 14, 39 and 40 and 34 through 37. I believe the allegations set forth are sufficient to allege a plausible intimate association as well.

In short, viewing the facts alleged in the complaint in the light most favorable to plaintiff, I conclude that plaintiff has sufficiently pled plausible claims against the City of Long Beach that survive a motion to dismiss. Therefore, the motion is denied in its entirety.

I'm going to obviously let Judge Tomlinson know that the Court has resolved this motion. Has a conference been set before her? Has that already happened, Mr. Ostrove?

MR. OSTROVE: Yes, we had a conference and we are engaged in document discovery as we speak.

THE COURT: Okay, good. So the case has already moved along somewhat. Is there anything else for today from plaintiff's counsel?

MR. OSTROVE: Nothing, your Honor.

MR. FINKEL: Sorry, Judge, Rich Finkel for the defendants, and I think I know the answer. You're stating that the motion was denied in its entirety. I'm assuming that that means that because the parties agreed to certain claims being dismissed, that you didn't address that.

THE COURT: Are you talking about in terms of the individual defendant or are you talking about the other claims as well?

MR. FINKEL: The reinstatement, the back

pay, the injunctive relief.

THE COURT: Yeah. I assumed those were withdrawn.

I'm considering those to be withdrawn, right, Mr. Ostrove?

MR. OSTROVE: The other damage claims.

THE COURT: Right.

MR. OSTROVE: (Ui) on the record.

THE COURT: So when I say I'm granting the motion, I'm granting it because those were withdrawn. But the order will make clear -- when we issue the order, it will make clear that -- just repeat those again so I can make sure we have it correct in the order, Mr. Finkel.

MR. FINKEL: Judge, my understanding is that the claims against the individual defendant are dismissed as unopposed.

THE COURT: Right.

MR. FINKEL: And the claims for reinstatement, back pay, injunctive relief and attorney's fees on the Article 78 are either dismissed or withdrawn, I'm not sure which, on res judicata grounds.

THE COURT: Right.

Correct, Mr. Ostrove?

MR. OSTROVE: I believe that's correct. I believe that what's left is emotional damages, front pay and attorney's fees.

THE COURT: Correct. The other claims are withdrawn and the claims against the city that remain, the category of damages are emotional damages, front pay and attorney's fees in connection with this action, okay?

MR. FINKEL: Thank you, Judge.

THE COURT: Thank you. Have a good day.

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

ELIZABETH BARRON December 24, 2015